2

No. 08-1206

In the Supreme Court of the United States

BRYAN ANDREWS AND SUSAN ANDREWS,

Petitioners,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JEFFREY W. SARLES
Counsel of Record
NATHAN T. KIPP
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Counsel for Respondent

QUESTION PRESENTED

Whether the Seventh Circuit correctly held, as have the only two other courts of appeals to address the issue, that courts may not order rescission of mortgages on a class-wide basis in actions brought under the Truth in Lending Act.

RULE 29.6 STATEMENT

Respondent Chevy Chase Bank, F.S.B., is a wholly owned subsidiary of Capital One Financial Corporation, a public company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Other Authorities

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

This case is not certworthy. The Seventh Circuit held that a court may not order a rescission of mortgages on a class-wide basis in a Truth in Lending Act ("TILA") case. The only other Circuits to address that issue—the Fifth and the First—reached the same conclusion. That conclusion comports with the text, history, and purpose of the relevant TILA provisions, which make clear that rescission under the TILA is a highly individualized mechanism unsuited for class treatment. Petitioners' positing of a conflict with this Court's opinion in *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), is fanciful. *Yamasaki* addressed the right to bring class actions under a jurisdictional statute governing the right to judicial review of agency decisions. Even if *Yamasaki* were applicable here, the decision below does not bar all TILA class actions. It leaves TILA claimants free to file class actions and seek both statutory and actual damages on a class-wide basis.

The court below also ruled that, in any event, petitioners had not satisfied the threshold requirements for a class action under Rule 23(b). Pet. App. 14a-17a. Hence, even if the Court were to grant the petition and reverse on the question presented, the Seventh Circuit's judgment would not be affected, making this a poor vehicle for review of the question presented.

Statutory Framework. Under the TILA, lenders that violate certain disclosure requirements may be ordered to pay statutory damages. 15 U.S.C. § 1640(a). In an individual action involving a mortgage loan, a court may award statutory damages of

at least $400 and no more than $4,000. *Id.* § 1640(a)(2)(A)(iii).[1] In a class action or series of class actions arising out of the same disclosure violation, the aggregate maximum award is the lesser of $500,000 or one percent of the creditor's net worth. *Id.* at § 1640(a)(2)(B). The TILA also authorizes the recovery of all actual damages. *Id.* § 1640(a)(1).

In addition, the TILA provides borrowers with a right of rescission in the case of certain types of mortgage loans. 15 U.S.C. § 1635(a), (e). The borrower may rescind the transaction until midnight of the third business day following closing of the loan, assuming the lender has delivered the required notice of the right to rescind and all material disclosures. *Id.* § 1635(a). To provide the lender with an incentive to provide those materials promptly, the right to rescind can be extended until the lender provides them, but not beyond three years after closing of the loan. *Id.* § 1635(f); see *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 411-412 (1998).

If the borrower exercises a right to rescind by providing notice to the creditor, the creditor has 20 days in which to return all the interest, charges, and fees collected from the borrower. 15 U.S.C. § 1635(b). Once the creditor has done so, the borrower must return any property in kind or, if that would be "impracticable or inequitable," the loan principal to the creditor. *Ibid.* By providing that these procedures "shall apply except when otherwise ordered by a court" (*ibid.*), § 1635 makes clear that courts may tailor the terms of a rescission to the particular factual context. Unlike the § 1640 damages provisions,

[1] These limits were $200 and $2000, respectively, prior to amendments enacted in 2008.

§ 1635 does not cap a rescinding borrower's recovery and does not reference class actions.

Proceedings Below. Petitioners refinanced their home mortgage with respondent in 2004. Pet. App. 2a. One year later, they filed a putative class action lawsuit, alleging that respondent failed to comply with TILA disclosure requirements and requesting statutory damages and rescission. *Id.* at 4a. Petitioners did not request actual damages. *Id.* at 38a.

The district court granted petitioners' motion for summary judgment, holding that respondent's disclosure statements did not fully comply with certain TILA requirements. Pet. App. 26a-38a. The court found that those violations did not entitle petitioners to statutory damages but did entitle them to rescind their mortgage. *Id.* at 39a-40a. The court then certified a class of thousands of borrowers who had received similar disclosure statements from respondent and ruled that all class members were entitled to rescind their mortgages. *Id.* at 43a-49a.

On a Rule 23(f) appeal, the Seventh Circuit reversed and vacated the class certification. Pet. App. 17a. The court found that the TILA's text, history, and purpose demonstrate that Congress did not intend to allow courts to order class-wide rescission. *Id.* at 6a-13a. The court noted that, in contrast to the TILA's damages provisions, the TILA's rescission provisions lack any references to class actions and that the massive liability posed by rescission class actions would be incompatible with Congress's efforts to cap potential lender liability in TILA actions. *Id.* at 10a-12a. The court further ruled that TILA rescission, as described in the statute, is "a purely *individual* remedy that may not be pursued on behalf of

a class." *Id.* at 12a. Moreover, "a host of individual proceedings would almost certainly follow in the wake of the certification of a class whose loan transactions are referable to rescission." *Id.* at 9a. Hence, the court concluded, "the rescission remedy prescribed by TILA is procedurally and substantively incompatible with the class-action device." *Ibid.*

The court of appeals alternatively held that plaintiffs' rescission claim does not satisfy the threshold requirements for class certification under Rule 23. Pet. App. 14a-16a. The court found unsatisfied (i) the "final relief" requirement of Rule 23(b)(2) because "a declaration of a 'rescission class' would only *initiate* a process of individual rescission actions"; (ii) the predominance requirement of Rule 23(b)(3) because class-wide rescission would "give rise to hundreds or thousands of individual proceedings"; and (iii) the superiority requirement of Rule 23(b)(3) because class-wide resolution of "a multitude of individual, varied rescission claims is neither 'economical' nor 'efficient'" and because individual actions for rescission are a "realistic" alternative to class actions. Pet. App. 15a-16a.

REASONS FOR DENYING THE PETITION

This case presents no circuit conflict, no conflict with this Court's precedents, and no reason to overturn the well-reasoned decision below. The district court decision, if not vacated by the Seventh Circuit, would have resulted in a host of individual rescission proceedings in courts all over the country, a far cry from the efficient resolution contemplated by Rule 23. The petition therefore should be denied.

I. THERE IS NO CIRCUIT CONFLICT FOR THIS COURT TO RESOLVE.

All three federal courts of appeals that have addressed the question presented have reached the same conclusion. The Fifth and First Circuits have previously held that TILA rescission may not be awarded on a class-wide basis, just as the Seventh Circuit did below.

In *James* v. *Home Construction Co.*, 621 F.2d 727, 730-731 (5th Cir. 1980), the Fifth Circuit held that rescission is "a purely personal remedy" that may not be awarded on a class-wide basis. The court explained:

> The language of Section 1635(b), it seems clear, gives the creditor ten days in each case in which to go through the steps of rescission before the matter can be brought to court. This is a right which the creditor has with each individual obligor. Thus the notion of a class action in this sort of context would contradict what would seem to be the Congressional intent about the nature of this action.

Ibid.

Petitioners note that *James* has been infrequently cited in subsequent cases in the Fifth Circuit (Pet. 36), but that sparse citation is not surprising because *James* conclusively resolved the class-action rescission issue for all courts in that circuit. Petitioners also contend that the Fifth Circuit retreated from *James* in *Tower* v. *Moss*, 625 F.2d 1161 (5th Cir. 1980). Pet. 36 n.10. But *Tower* does not mention *James* or even address whether a court may award TILA rescission on a class-wide basis.

More recently, the First Circuit held in *McKenna* v. *First Horizon Home Loan Corp.*, 475 F.3d 418, 423 (1st Cir. 2007), that "class certification is not available for rescission claims, direct or declaratory, under the TILA." That holding rests on the court's conclusion, based on an extensive analysis of the TILA's text and history, that "Congress did not intend rescission suits to receive class-action treatment." *Ibid.* In addition to noting that the TILA's rescission provisions do not reference class actions whereas the TILA's damages provisions do (*ibid.*), Judge Selya's opinion for the court found it "plain that unrestricted class action availability for rescission claims would open the door for vast recoveries," which would be "considerably in excess of the cap [that] Congress painstakingly established for damages class actions." *Id.* at 424. The court also found that "[t]he highly individualized character of this process and the range of variations that may occur render rescission largely incompatible with a sensible deployment of the class-action mechanism." *Id.* at 424-25. Accord *LaLiberte* v. *Pacific Mercantile Bank*, 53 Cal. Rptr. 3d 745, 751 (App. 2007), cert. denied, 128 S. Ct. 393 (2007).

No other federal court of appeals has addressed this issue. Petitioners point to two cases, *In re Community Bank*, 418 F.3d 277 (3d Cir. 2005), and *Grimes* v. *New Century Mortgage Corp.*, 340 F.3d 1007 (9th Cir. 2003), in an attempt to manufacture a circuit conflict. But neither case addresses whether TILA rescissions may be awarded on a class-wide basis. In *Community Bank*, the Third Circuit remanded to determine whether the representatives of a proposed settlement class met the Rule 23 adequacy requirement. 418 F.3d at 303-307. And in *Grimes*, the Ninth Circuit addressed only the propriety of summary judgment, not any class issues. 340 F.3d at

1010-1011. Hence, petitioners have no basis for their assertion that "the circuits are not aligned" on the availability of class-wide TILA rescissions. Pet. 37. There is simply no conflict for this Court to resolve.

II. THE DECISION BELOW DOES NOT CONFLICT WITH *CALIFANO* v. *YAMASAKI*.

Petitioners contend that the Seventh Circuit's decision conflicts with this Court's ruling in *Yamasaki*. Pet. 11-19. Both the First and Seventh Circuits properly rejected that meritless argument.

Yamasaki involved a challenge to a federal agency's attempt to recoup alleged overpayments of certain benefit funds. After the plaintiffs' administrative claims were rejected, they sued in federal district court under § 205(g) of the Social Security Act, which provides that "[a]ny individual" may seek review of a final administrative decision "by a civil action." 442 U.S. at 698 n.12. The district court certified a class, a ruling challenged by the agency.

This Court articulated the issue as "whether *jurisdiction* under § 205(g) of the Act, 42 U.S.C. § 405(g), permits a federal district court to certify a nationwide class." *Yamasaki*, 442 U.S. at 684 (emphasis added). The agency argued that § 205(g) does not grant such authority because its "[a]ny individual" language shows that Congress contemplated only "a case-by-case adjudication of claims * * * that is incompatible with class relief." *Id.* at 698-699. This Court rejected the agency's argument, pointing to "other jurisdictional statutes" that reference individual plaintiffs and allow class relief. *Id.* at 700. In that context, the Court stated: "In the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil na-

ture' under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court." *Ibid.*

As the Seventh Circuit explained below, the "TILA is entirely different from the jurisdictional statute at issue in *Yamasaki*." Pet. App. 10a. Here, the issue is not, as in *Yamasaki*, whether there is a jurisdictional bar to class-wide judicial review of an administrative decision. Instead, the issue is whether Congress intended the inherently individualized TILA rescission remedy to be awardable to an entire class. That issue was not addressed by this Court in *Yamasaki* and thus there can be no conflict. See *McKenna*, 475 F.3d at 425-426.[2]

Moreover, the decision below does not bar class certification of TILA claims. Courts may continue to certify TILA classes and award statutory and/or actual damages on a class-wide basis. Thus, even if the *Yamasaki* statement that "class relief is appropriate in civil *actions* brought in federal court" (442 U.S. at 700, emphasis added) applied outside the *Yamasaki* jurisdictional context, the decision below is consistent with it because class relief remains available in TILA *actions*. The Seventh Circuit simply held that one untraditional *remedy* under the TILA—a right to rescind within three days of receiving specified disclosures that involves highly individualized inquiries—is unsuitable for class treatment. That holding

---

[2] Petitioners inaccurately contend that "the Seventh Circuit does ultimately acknowledge that its ruling conflicts with *Yamasaki*." Pet. 16. The opinion below contains no such acknowledgment, instead firmly rejecting petitioners' *Yamasaki* argument. Pet. App. 9a-10a.

does not conflict with even the unduly broad reading of *Yamasaki* posited by petitioners.

III. THE COURT BELOW CORRECTLY RULED THAT TILA RESCISSION MAY NOT BE AWARDED ON A CLASS-WIDE BASIS.

A. The TILA's Text And History Show That Congress Did Not Intend To Permit Class-wide Rescissions.

Whereas the TILA's damages provisions expressly reference class actions, the TILA's rescission provisions do not. Compare 15 U.S.C. § 1640(a)(2)(B) with *id.* § 1635. As the Seventh Circuit noted, "[t]his direct contrast between the text of TILA's damages and rescission provisions cannot be ignored." Pet. App. 11a; accord *McKenna*, 475 F.3d at 424. Moreover, class actions are addressed in § 1640(a) with respect to a damages cap that limits liability for violations of the TILA's complex disclosure requirements. The omission of any such cap in § 1635 indicates that Congress did not contemplate class-wide rescissions and thus saw no need to cap rescission liability. See Pet. App. 10a-11a.

Permitting TILA rescission classes would defeat Congress's intent to limit lenders' liability, expressed in succeeding amendments over several decades. Before 1974, the TILA did not mention class actions. Congress amended § 1640 in 1974 to adopt caps on statutory damages, including an aggregate cap of $100,000 in class actions, without making any change to § 1635. Truth in Lending Act Amendments, Pub. L. No. 93-495, tit. IV, § 407, 88 Stat. 1500 (1974). This was the first (and remains the only) reference to class actions in the TILA. Congress adopted the 1974 amendments "to place an aggregate

limitation on a creditor's class action liability for violations not involving actual damages." S. Rep. No. 93-278, at 14-15 (1973). Congress adopted no similar limitation on rescission liability, indicating that it did not contemplate class action rescissions, given the devastating impact that wholesale rescissions would have on the mortgage lending industry.

Congress raised the statutory damages cap to $500,000 in 1976, explaining that it viewed that cap as both appropriate to protect against devastating liability and sufficient to "act as a significant deterrent to even the largest creditor." S. Rep. No. 94-590, at 8 (1976), reprinted in 1976 U.S.C.C.A.N. 431, 438; see Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257. Again, in executing such a balancing act, Congress would not have completely disregarded rescission if it thought that remedy available in class actions. "The notion that Congress would limit liability to $500,000 with respect to one remedy while allowing the sky to be the limit with respect to another remedy for the same violation strains credulity." *McKenna*, 475 F.3d at 424. Congress again amended § 1640(a) in 1980 to bar aggregate recoveries from exceeding the cap in a "series of class actions arising out of the same failure to comply by the same creditor." Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, tit. VI, § 615(a)(1), 94 Stat. 132 (1980).

In 1995, Congress further limited the potential for expansive TILA liability, first by temporarily suspending a broad range of TILA class actions and then by increasing the tolerance levels for minor deviations from disclosure obligations. See Truth in Lending Class Action Relief Act of 1995, Pub. L. No. 104-12, 109 Stat. 161; Truth in Lending Act Amend-

ments of 1995, Pub. L. No. 104-29, 109 Stat. 271. Congress adopted those amendments in response to concerns about potentially devastating lender liability following a flurry of class action lawsuits filed in the wake of *Rodash* v. *AIB Mortgage Co.*, 16 F.3d 1142, 1147 (11th Cir. 1994), in which the Eleventh Circuit held (in a non-class-action case) that minor TILA violations triggered a mortgagor's right to rescind. Congress acted to prevent the ensuing class actions from imposing devastating losses on the mortgage industry.

Petitioners state that nothing in the 1995 amendments "eliminated class rescission liability." Pet. 32. That is true because rescission had *never* been awardable to an entire class under the TILA. Indeed, not a single participant in the post-*Rodash* floor debate ever suggested that the TILA made rescission available to an entire class of consumers, and none of the numerous bills introduced to amend the TILA during the moratorium proposed barring rescission class actions. These facts refute petitioners' suggestion that Congress "directly rejected" a ban on rescission class actions. Pet. 31; see *McKenna*, 475 F.3d at 424-425.

By repeatedly enacting provisions to protect lenders from undue liability, Congress recognized that complying with the complex TILA disclosure provisions is not easy and that a failure to do so should not be disproportionately punished. Class-wide rescission would impose enormous liability at one fell swoop. In the court of appeals, petitioners posited that respondent's liability in this case alone would be some $210 million. C.A. Br. 39 n.13. The First Circuit estimated roughly the same amount in *McKenna*, 475 F.3d at 424. The threat of such devas-

tating liability from just one rescission class action would inevitably make credit more costly and difficult to obtain, an outcome squarely at odds with Congress's efforts to protect both borrowers and the credit industry, as reflected in the TILA's text and history.

B. The Rescission Process Set Forth In The TILA Is Incompatible With Class Resolution.

The TILA's description of the rescission process confirms that Congress did not contemplate rescission class actions. It gives borrowers who received the required disclosures a three-day cooling-off period after closing on their loans to change their minds. 15 U.S.C. § 1635(a). Borrowers do not change their minds as a class. Thus, borrowers wishing to rescind must provide notice of that intent to the creditor, a requirement that is inherently individual. *Ibid.* Moreover, the actions prescribed for both the creditor and borrower during the rescission process depend on what is "appropriate," "impracticable," and "inequitable." *Ibid.* The application of these terms is inherently specific to the context of each creditor-borrower relationship and thus inconsistent with class-action treatment. See Pet. App. 7a-8a; *McKenna*, 475 F.3d at 427 n.6.

Indeed, § 1635(b) expressly authorizes case-by-case treatment by providing that "[t]he procedures prescribed by this subsection shall apply except when otherwise ordered by a court." That provision confers equitable authority on courts to tailor the rescission process to fit the specific context of each creditor-borrower relationship. That case-by-case tailoring cannot be reconciled with class-wide rescission

and shows that Congress viewed rescission as a personal, rather than a class, remedy.

The judicial intervention authorized by § 1635(b) occurs frequently. *E.g.*, *Ruiz* v. *R&G Fin. Corp.*, 383 F. Supp. 2d 318 (D.P.R. 2005); *Am. Mortgage Network* v. *Shelton*, 2006 WL 909415 (W.D.N.C. Apr. 6, 2006), aff'd, 486 F.3d 815 (4th Cir. 2007). For example, borrowers and lenders often disagree over the precise amount to be reimbursed to the borrower. *E.g.*, *Semar* v. *Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699, 705 (9th Cir. 1986).

Disputes also frequently arise over eligibility for rescission. For example, since rescission applies only to a principal residence, courts often must resolve disputes over whether the property securing the loan is in fact the borrower's principal residence as opposed to a vacation home or investment property. *E.g.*, *Kovalik* v. *Delta Inv. Corp.*, 611 P.2d 955, 957-58 (Ariz. App. 1980). Similarly, disputes arise over whether the loan was for business purposes, in which case the loan would not be subject to rescission or even to the TILA at all. See *Sherlock* v. *Herdelin*, 2008 WL 732146, at *3 (E.D. Pa. Mar. 17, 2008). Or a dispute may arise over whether the mortgaged property had been sold, such as where a contract for sale has been executed but the sale has not occurred, which too would make the loan ineligible for rescission. See 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(e)); *Hefferman* v. *Bitton*, 882 F.2d 379, 383-84 (9th Cir. 1989); *Dailey* v. *Leshin*, 792 So. 2d 527, 531-32 (Fla. App. 2001). Although petitioners say such "eligibility issues" would be "few and easy to evaluate" (Pet. 16), these cases and many more like them make clear that such disputes can be resolved only by delving into the particular circumstances of each case.

Yet another example involves whether the borrower will be able to return the principal once the creditor voids the security interest. In practice, most borrowers do not have sufficient funds on hand to tender back the principal and therefore arrange for alternative financing. Accordingly, lenders frequently seek judicial intervention so that they are not left completely unprotected before the borrower tenders back the principal. *E.g.*, *Yamamoto* v. *Bank of N.Y.*, 329 F.3d 1167, 1171 (9th Cir. 2003); *Large* v. *Conseco Fin. Serv. Corp.*, 292 F.3d 49, 55 (1st Cir. 2002). In these circumstances, courts often use their modification authority to require the borrower to repay the principal before the lien is released.

Individualized issues also arise regarding payments to third parties. While a creditor generally must refund fees that the rescinding borrower paid to a third party, such as for a title search or appraisal, the creditor need not return amounts paid to a third party "outside of the credit transaction," such as costs incurred for a building permit or zoning variation. 12 C.F.R. Pt. 226, Supp. 1, ¶ 226.23(d)(2)-2. Disputes thus may arise over whether a particular payment to a third party must be refunded. *E.g.*, *Gen. Home Capital Corp.* v. *Campbell*, 800 N.Y.S.2d 917, 918-19 (Dist. Ct. Nassau County 2005); *Mortgage Source, Inc.* v. *Strong*, 75 P.3d 304, 307 (Mont. 2003).

Parties also dispute the timeliness of rescission. Because those disputes depend on "the date of consummation of the transaction" (§ 1635(f)), the outcome necessarily depends on facts specific to each loan transaction. *E.g.*, *Gibbons* v. *Interbank Funding Group*, 208 F.R.D. 278, 284 n.8 (N.D. Cal. 2002); *Westbank* v. *Maurer*, 658 N.E.2d 1381, 1389 (Ill. App.

1995). Other disputes may concern whether the creditor may set off the amount to be rescinded from the principal it provided to the borrower (see *Harris* v. *Tower Loan*, 609 F.2d 120, 123 (5th Cir. 1980)), or whether the borrower may condition its tender of the money or property received from the lender (see *Regency Sav. Bank* v. *Chavis*, 776 N.E.2d 876, 868 (Ill. App. 2002)).

As these many examples make clear, the rescission process involves individual circumstances, choices, and time frames that inevitably give rise to disputes that can be resolved only through individualized judicial resolution. These are not "ministerial" tasks, as petitioners assert. Pet. 15. By its very nature, this process cannot take place in a single class action. The course of the entire rescission process "lies within the court's equitable discretion, taking into consideration all the circumstances," and "must be determined on *a case-by-case* basis." *Yamamoto*, 329 F.3d at 1173 (emphasis added); accord *Williams* v. *Homestake Mortgage Co.*, 968 F.2d 1137, 1140-1141 (11th Cir. 1992). No wonder courts have concluded that TILA rescission is "a personal remedy not suitable for class treatment." *LaLiberte*, 53 Cal. Rptr. 3d at 751.

These difficulties are not overcome by a mere "declaration" of a right to rescind. See Pet. App. 41a. Such a declaration would not produce the efficient resolution of claims by similarly situated plaintiffs in a single proceeding that Rule 23 contemplates. It would inevitably open up a new wave of individual proceedings in many different courts by borrowers residing throughout the country. This is a recipe for chaos, not efficiency, as the courts of appeals that have addressed this issue have concluded. See Pet.

App. 8a; *McKenna*, 475 F.3d at 426-427. The petition raises no reason why this Court should conclude otherwise.

C. Class Actions Are Unnecessary To Vindicate A TILA Right To Rescind.

Petitioners incorrectly contend that seeking rescission in an individual action would be "a virtually impossible task." Pet. 11. In fact, the TILA facilitates individual rescission claims by authorizing borrowers to obtain up to three years' worth of free interest, finance charges, points, and other fees. 15 U.S.C. § 1635(b). For example, on a typical mortgage of $300,000, originated for one point and $500 of additional loan charges at a 6% interest rate, rescission after three years would provide the consumer with at least $57,500—$3,000 in points, $500 in additional loan costs, and $54,000 in interest. In many cases, plaintiffs could seek actual and statutory damages as well. See Pet. App. 16a.

In addition, the TILA provides for the recovery of attorneys' fees (15 U.S.C. § 1640(a)(3)), effectively removing another common obstacle to individual suits. The availability of a substantial recovery, "when combined with the attorneys' fees normally awarded to successful plaintiffs in TILA rescission cases, afford a powerful incentive to debtors to sue individually." *McKenna*, 475 F.3d at 426; see Pet. App. 16a-17a. Accordingly, TILA plaintiffs frequently seek rescission on an individual basis. *E.g.*, *Rogers* v. *Countrywide Home Loans, Inc.*, 2009 WL 1118898 (S.D. Ala. Apr. 24, 2009); *Demarest* v. *Quick Loan Funding, Inc.*, 2009 WL 940377 (C.D. Cal. Apr. 6, 2009); *Sartain* v. *Aurora Loan Servs., LLC*, 2009 WL 950946 (C.D. Cal. Apr. 6, 2009); *Foster* v. *Smith*, 2009 WL 703702 (D. Minn. Mar. 16, 2009).

* * * * *

As described *supra* p. 4, the Seventh Circuit alternatively ruled that petitioners had not satisfied the threshold requirements for a class action under Rule 23(b). Pet. App. 14a-17a. Because that ruling would stand even if the Court were to grant the petition and reverse on the question presented, this case is a poor vehicle for review of the question presented and may be denied on that basis as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY W. SARLES
Counsel of Record
NATHAN T. KIPP
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
Counsel for Respondent

MAY 2009